89-606

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

JUDY HUBER,

Petitioner,

vs.

SIMON LEIS, SHERIFF,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the First Amendment is violated when a deputy sheriff does not abide by a chain of command regulation and makes a complaint to the FBI that her son was mistreated in the course of his arrest by other deputy sheriffs, and where there is no evidence of disruption or adverse effect on the operations of the Sheriff's office as a result of the complaint.

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JUDY HUBER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Judy Huber, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on August 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

The opinion and order of the United States District Court for the Southern District of Ohio (Rubin, D.J.) appears at 704 F.Supp. 131 (S.D. Ohio 1989). It is reprinted in the appendix hereto, p. 6a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 the petitioner brought this suit in the Southern District of Ohio on September 22, 1987. On January 4, 1989 the District Court granted respondent's motion for summary judgment which was based on a stipualated record. On August 31, 1989 the Sixth Circuit Court of Appeals affirmed the District Court's decision.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Judy Huber is a Deputy Sheriff of Hamilton County, Ohio. She is assigned to the Corrections Division.

On August 6, 1987 Ms. Huber's son was playing basketball with friends of his at the Colerain Elementary School in Cincinnati, Ohio. During a break in the game the school building was entered, and presumably set off an alarm. Deputy Sheriffs arrived at the scene and apprehended Petitioner's son. The other boys fled. In order to pursue the others, a Deputy Sheriff handcuffed petitioner's son to a fence where he remained while the Deputies pursued the others (R-1, Complaint).

Shortly after this incident on August 10, 1987, petitioner complained to the local Cincinnati F.B.I. office that her son's civil rights may have been violated by having been handcuffed to a chainlink fence (R-17, Final Pretrial Order, Sec. V, Agreed Facts). Ms. Huber did not comply with Sheriff's rule 1.20 which states that "any Sheriff's employee having a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor".

Subsequently, Ms. Huber and her son visited the F.B.I. office on August 12, 1987, and the son gave a firsthand account of his arrest to an F.B.I. agent. The single focus of the complaint was the handcuffing, and Ms. Huber made no charges that the Sheriff, himself, committed any wrongdoing, or that there were any widespread illegal practices. (R-17 Final Pretrial Order, Sec. V, Agreed Facts).

Sheriff Leis' agents on hearing of petitioner's complaint to the F.B.I., initiated an investigation that was conducted by a Sheriff's detective. The Detective concluded in a report of August 19, 1987 that Ms. Huber demonstrated a lack of professionalism by violating the Sheriff's Rule 1.20 which provides that "Any Sheriff's employee have a grievance involving another member that cannot be resolved amicably shall first consult his immediate supervisor."

Thereafter on August 26, 1987 Petitioner was recommended to receive an official reprimand which was approved by Sheriff Leis on September 1, 1987. (R-1 complaint ¶¶6-7).

In the course of the proceedings in District Court Sheriff Leis once claimed that ". . . plaintiff's violation of Section 1.20 has had an adverse impact on discipline and morale within the Sheriff's office, and has caused unnecessary work and consternation for Deputies Fieler and Lantry, has needlessly burdened the F.B.I. and has undeservedly diminished the public's confidence in and image of the Hamilton County Sheriff's office". (R-13 Defendant's Memorandum Contra Plaintiff's Motion of Partial Summary Judgment, Affidavit of Simon L. Leis, Jr.). The respondent abandoned these allegations in Stipulation of Facts entered into for the purpose of the cross-motions for summary judgment. Instead, the Sheriff in the Stipulations stated that it was his "position" that the purpose of Sheriff's Rule 1.20 is to maintain discipline, high morale, etc. (R. 18 Stipulation of Facts for Cross-Motions for Summary Judgment ¶2).

There was no evidence or stipulation of any disruption or adverse effect on the Sheriff's operation because of Ms. Huber's complaint to the F.B.I.

Ms. Huber works in the Correctional Division. The Deputies about whom she complained worked in the Road Patrol Division (R-13 Defendant's Memorandum Contra Plaintiff's Motion for Partial Summary Judgment, Affidavits of Lantry and Feiler). Finally Ms. Huber does not have a close working relationship with the Sheriff. (R-18 Stipulations of Fact for Cross-Motions ¶6).

The District Court of the Southern District of Ohio determined that Ms. Huber's communication involved a matter of public concern because the citizens of Hamilton County are concerned with whether Sheriff's Deputies are conducting themselves lawfully in the performance of their duties. *Huber* v. *Leis*, 704 F.Supp. 131 (S.D. Ohio 1989). The court further noted that ". . . An exhaustive review of the record does not

reveal that plaintiff's inquiry to the FBI represents threats, abusive conduct, spite or any other frustration towards her colleagues or superiors. . . ." *Id.* p. 136. However, the District Court decided that a wide degree of deference should be accorded the public employer and that Ms. Huber's ". . . actions already have and further enhance the potential for undertermining the authority of the Sheriff. . . ." *Id.* p. 136.

In affirming, the Sixth Circuit stated in a *per curiam* opinion that ". . . assuming but without expressly deciding that the speech was constitutionally protected, we are nontheless of the opinion that in all events the balancing test between the exercise of protective speech, if such it was, and the interest of the Sheriff in the efficient performance by the employees of his department, decidedly favors the latter . . ." (Slip Opinion, p. 3-4, App. p. 4a).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision authorizing punishment of a public employee for a private complaint to a law enforcement agency in the absence of any evidence of interference with the operations of the employer is contrary to decisions of this Court and not in accord with decisions of other Circuits.

A chain of command requirement, without more, cannot justify the punishment of a public employee's nonpublic complaint of unlawful activity to a law enforcement agency where there is no evidence of disruption or adverse affect on any governmental interest of the employer.

The lower court decisions cannot withstand the analysis and the holding of *Rankin* v. *McPherson*, ____ U.S. ____, 107 S.Ct. 2891 (1987). *Rankin* reaffirmed the principle that once it is determined that the communication is found to be on a matter of public concern, ". . . the State bears a burden of justifying the discharge on legitimate grounds. . . ." *Id.* 2898. *Rankin* then required *evidence* of an impingement of a governmental employer's interest, a *demonstration* that a state interest outweighs the employee's First Amendment rights. *Id.* 2899. Here there is no evidence of impingement, nor is there even an allegation that Ms. Huber's communication impinged on an employer interest.[1] Without such a showing a public employer has no power to preclude or control employee communications on subjects of public concern. Otherwise, speech would be totally at the discretion of the public employer. The balancing test of *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) is not satisfied by mere assumptions. The employer must come forward and demonstrate that the statement ". . . impairs discipline by superiors or harmony among co-workers . . . or has a

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[1] There is neither a suggestion in the report of the Sheriff's Detective (R-1 Plaintiff's Complaint Ex. A & B), nor the reprimand itself that Ms. Huber adversely effected any employer interests identified in *Pickering*, *supra*.

detrimental impact on close working relationships . . . or impedes the performance of the worker's duties or interferes with the regular operation of the enterprise. . . ." *Id.* 570-573. And that does not end the matter. The court then may determine that the value of the speech outweighs the particular employer interest at issue.

The lower Courts below failed to adhere to *Connick* v. *Myers*, 461 U.S. 138 (1983). *Connick* involved a disgruntled Assistant District Attorney in an office of fifteen other attorneys. The attorney had an ongoing dispute with her employer. In the course of this she circulated a questionnaire of fourteen questions to her fellow attorneys which inquired of their confidence in their superiors, their morale, etc. All but one of the matters, the Court held, were nonpublic concerns. *Id.* 154. In addition, there was *evidence* that the disgruntled attorney was creating a "mini-insurrection" in the office. *Id.* 142. In light of those factors the Court stated

> When close working relationships are essential to fulfilling public responsibilities, a wide range of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationship is manifest before taking action. *We caution that a stronger showing may be necessary if the employer's speech more substantially involved matters of public concern. Id.* 153. (Emphasis added).

Here the District Court correctly found that

> . . . the public employee speech in the present case is substantially involved in matters of public concern and is therefore entitled to the highest level of protection. Plaintiff's speech was motivated by her belief that her son's constitutional rights were violated by Deputy Fieler on August 6. Clearly it is a matter of public concern to the citizens of Hamilton County that the Sheriff's

> deputies are conducting themselves lawfully in the performance of their duties. An exhaustive review of the record does not reveal that Plaintiff's inquiry to the FBI represents threats, abusive conduct, spite, or any other personal frustration toward her colleagues or superiors. This Court also notes as the Supreme Court did in *Pickering* that plaintiff's complaint was not directed at anyone she would be working with on a day to day basis.

Huber v. *Leis*, 704 F. Supp. at p. 135-136

Having found that the speech was clearly a matter of public concern,[2] the District Court and the Sixth Circuit failed to adhere to the caution of *Connick* v. *Myers*, *supra*, at 153, which became the holding in *Rankin*. Other Circuits have applied this injury-in-fact principle of *Rankin*.

In *Jungels* v. *Pierce*, 825 F.2d 1127, 1132 (7th Cir. 1987) speculation "concerning public perceptions and their impact," without evidence, was insufficient to overcome a plaintiff's First Amendment claim.

In *Brasslet* v. *Cota*, 761 F.2d 827, 846 (1st Cir. 1985) the court stated that detrimental impact must be objectively shown lest "public employers . . . promiscuously offer a subjective justification that could almost never effectively be rebutted." A town fire chief was held unconstitutionally discharged in retaliation for the exercise of his First Amendment rights in *Brasslet*. The fire chief whose previous work was

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[2] The trial court's finding that Petitioner's speech is a matter of public concern is supported by *McKinley* v. *City of Eloy*, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (Speech on competency of police force directed to public through city council meetings is a matter of great public concern); *McMurphy* v. *City of Flushing*, 802 F.2d 191, 196 (6th Cir. 1986) (Obviously, the public is concerned with how police department is operated and efforts to give public exposure to alleged misconduct are protected); and, *O'Brien* v. *Town of Caledonia*, 748 F.2d 403, 406-407 (7th Cir. 1984) (A policeman's rights must be vigilantly protected because he or she is extraordinarily able to inform the public of deficiencies in this important governmental department).

called commendable, *Id.* at 830, was fired because he had criticized the town's firefighting equipment and capabilities during a television interview. Reversing the lower court, the First Circuit said:

> The district court . . . obscured the values underlying the First Amendment and condemned the very type of public discourse that our Constitution actively seeks to preserve, even at a substantial cost to the government. That Brasslett's interview may have been somewhat critical of the Town or the Council hardly strips it of First Amendment sanction. The Amendment was calculated to protect precisely this type of speech, since it is likely that the government would be motivated to stifle only critical, revealing, or embarrassing remarks. *Id.* at 844.

Addressing the defendants' argument that the firing was necessary because of the trust needed between the employer and employee, the court in *Brasslet* said:

> [A]n employer may not be allowed to claim that his essential trust relationship with an employee was eroded solely by virtue of the employee's statements. *There must be an additional and independent showing of actual and significant harm.* *Id.* at 845-46.

Similarly, chain-of-command requirements such as Sheriff's Rule 1.20 have been held by other Circuits to be an insufficient justification by itself to suppress speech on public matters.

In a case very similar to that at bar, *Brockell* v. *Norton*, 732 F.2d 664 (8th Cir. 1984), the court held that a public employee who was discharged for failure to observe a chain of command policy was unconstitutionally deprived of his free speech rights. The plaintiff employee (Brockell) was a police department radio operator-dispatcher who discovered that a part-time officer improperly had a copy of the state's law en-

forcement standards examination. Brockell reported this information to the chief of police. Ten days later, Brockell made an anonymous phone call to the officer in charge of testing. *Id.* at 665. When the mayor and city council found out that Brockell made this call, they discharged him because he violated the police department's chain-of-command policy which required department business to be brought first to the chief of police and then, if not properly resolved, to the mayor. *Id.* at 665-6.

Brockell's First Amendment contention under 42 U.S.C. § 1983 was that his report to the officer in charge of testing was protected conduct under the balancing test from *Pickering*, and thus he could not be discharged under the city's chain of command policy. *Id.* at 666. The *Brockell* court agreed:

> A police department has a significant governmental interest in developing efficiency, loyalty, discipline, *espirit de corps*, and uniformity in its operations. . . . We cannot simply decide in the abstract, however, that a chain-of-command policy designed to protect this interest will always take precedence over the interest of a public employee in open communication. Rather, we must look to the particular circumstances of each case to determine the importance of enforcing the chain of command against an employee whose speech breaches that policy. *Id.* at 667.

Also important to the decision was that "this private call to an authority positioned to make a quick investigation and resolution of the alleged improprieties was less disruptive to the City and its police department than other forms of communication which Brockell might have chosen." *Id.* at 668.

Similar issues to those in the instant case were treated in *Czurlanis* v. *Albanese*, 721 F.2d 98 (3rd Cir. 1983) where the speech by a county employee at a public meeting of the county board alleging inefficiency and similar claims was pro-

tected and thus defendants were liable for suspending the plaintiff in retaliation for that speech. The appeals court reasoned that the plaintiff's speech was of significant public and not merely personal or private interest, and that the county's chain of command policy could not be used to justify the retaliatory action taken against him. *Id.* at 105.

The chain of command policy allegedly violated in *Czurlanis*, the court held, "cannot be used to justify the retaliatory action taken against Czurlanis under the rubric of the county's interest in promoting the efficiency of public service. It is simply incompatible with the principles that underlie the First Amendment to countenance a policy that would severely circumscribe in this manner speech on public issues, which occupies the 'highest rung of the hierarchy of First Amendment values.' " *Id.* at 105 (citation omitted).

Another case similar to that at bar, *Southside Public Schools* v. *Hill*, 827 F.2d 270 (8th Cir. 1987), was also decided in favor of plaintiffs on their First Amendment claims.

As the court in *Hill* stated, the issue was

> [W]hether appellees (Arkansas school teachers) were exercising constitutionally protected rights of free speech under the First Amendment when they complained about a colleague's deficiencies in implementing the programs provided by federal law for handicapped pupils, or where merely asserting a personal grudge or internal grievance over employment and working conditions which should have been processed through channels rather than by "going public" and sending a letter to the State Department of Education which resulted in an investigation disclosing certain defects in the school's procedures. *Id.* at 272 (footnotes omitted).

Affirming the lower court, the appellate panel held that the teachers' complaint was a matter of public concern and protected by the First Amendment. "[Plaintiffs] were not asserting a private grievance respecting employment or work-

ing conditions," thus *Connick* was not applicable. *Id.* at 273. "Nor were the [plaintiffs] prosecuting a personal vendetta or feud against [their colleague]." *Id.* As such, the adverse personnel actions taken against plaintiffs were in violation of their constitutional rights. *Id.* at 276.

In *O'Brien* v. *Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), a police officer criticized the dismissal of citations against lawbreakers in conversations with his attorney, the local District Attorney, The chief judge of the county court, the F.B.I., and the media. The Town of Caledonia required employees to observe a rule which said they must "treat as confidential the official business of the department."

The *O'Brien* court relied on its previous decision in *Hanneman* v. *Breier*, 528 F.2d 750, 755 (7th Cir. 1976), and held that the confidentiality rule violated the First Amendment as defendants had failed to show that the "state interest in confidentiality applicable on these facts [outweighed] the public and individual interests in the particular statement made." 748 F.2d at 407, *quoting Hanneman*, 528 F.2d at 754. The *Hanneman* rationale was:

> Of course, department discipline may be undermined when police officers disobey an official regulation and an express order not to disclose police business. The department's general interest in discipline alone, however, does not outweigh the individual and public interest in the subject of plaintiff's [disclosure]. 528 F.2d at 755.

The *O'Brien* court ruled that the public has a special interest in the dissemination of information in regard to the operation of its government, especially when one of its official leaders is suspected of corruption. As such, these communications are "deserving of vigilant protection by the First Amendment." 748 F.2d at 407-08.

The court in *O'Brien* further said that "[G]overnmental bodies may not restrict the flow of information to the public solely on considerations of discipline or internal operating procedures" *Id.* at 408.

CONCLUSION

The Sixth Circuit's decision is a very substantial incursion into what had been an area of protected speech by public employees. Previously, public employees had First Amendment protection to make non-disruptive, private complaints to law enforcement agencies about claimed illegal or improper activity in their workplace. The Sixth Circuit's decision now authorizes the punishment of these communications. This is not the rule in other Circuits, and is a misreading of the decisions of this Court.

Respectfully Submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 89-3052

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDY HUBER,
Plaintiff-Appellant,

vs.

SIMON LEIS, SHERIFF,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
(Filed August 31, 1989)

Before: ENGEL, Chief Judge; KEITH and MARTIN, Circuit Judges.

PER CURIAM. Plaintiff Judy Huber appeals an order of the United States District Court for the Southern District of Ohio granting summary judgment to the defendant, Sheriff Simon Leis, on her claim under 42 U.S.C. § 1983 that the Sheriff's reprimand of Huber following her complaint to the Federal Bureau of Investigaton (FBI) regarding the conduct of two deputy sheriffs violated her first amendment right of free speech.

Judy Huber is employed by the Hamilton County, Ohio Sheriff's Department as a deputy sheriff in the position of

Correction's Officer. On August 6, 1987, Huber's son was arrested by two deputy sheriffs for criminal trespass and resisting arrest. While the officers chased three other suspects, they left Huber's son handcuffed to a chain link fence. On August 10, Huber complained to the FBI that her son's civil rights were violated when the officer handcuffed him to the fence. Huber never consulted anyone in the Sheriff's office about the incident and her resulting complaint. The FBI subsequently ordered that the file on Huber's son be closed.

An investigation by the Sheriff's department determined that Huber had violated an internal rule of the office (Sheriff's Rule 1.20) which states:

> Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his supervisor.

On September 1, 1987, Sheriff Leis approved and issued a written reprimand to Huber for her violation of Sheriff's Rule 1.20. Huber filed this action on September 22, 1987 claiming that the reprimand violated her right to free speech under the first amendment. The parties subsequently submitted a stipulation of facts and agreed upon a final decision by the court upon cross motions for summary judgment without an oral hearing. The district court determined that although Huber was a public employee, her action in consulting the FBI was constitutionally protected because it involved a matter of public concern. He determined, however, that her interest in asserting her public concern did not outweigh the Sheriff's interest in avoiding the disruption of his office, undermining of his authority and destruction of working relationships and that therefore the Sheriff was entitled to summary judgment. Huber filed this timely appeal.

On appeal, Huber alleges that the district court properly determined that her speech touched on a public concern, but held that where there is no evidence that the speech would or did cause disruption or an adverse effect upon the government operation, the first amendment does not permit a repri-

mand of a public employee for such behavior. She further contends that Sheriff's Rule 1.20 is unconstitutionally vague and overbroad. Sheriff Leis counters that the district court reached the correct result for the incorrect reason. He contends that Huber's complaint to the FBI did not touch a matter of public concern because no first amendment concerns are involved here, since the communication was of a purely private nature, made by a mother on behalf of her son privately to the officer of another law enforcement agency than that to which she was a member. The Sheriff also urges with great persuasiveness that no speech or utterance was penalized by him, the penalty having been imposed solely for the non-performance of a duty imposed upon plaintiff by the sheriff's own regulations to report to her superiors any complaints involving other members of the staff of the sheriff's staff. Further, he contends that Sheriff's Rule 1.20 is not unconstitutional either on its face or as applied here.

A public employee's speech is protected when it involves "a matter of public concern." *Connick* v. *Myers*, 461 U.S. 138, 146 (1983). Thus, as the Supreme Court observed in *Connick*, "when an employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in response to the employee's behavior." *Id.* at 147. Whether speech is protected is a matter of law, *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984), but that determination is to be made only after the court has made "an independent examination of the whole record to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Id.* (quoting *New York Times* v. *Sullivan*, 376 U.S. 254 (1964)). Once it is determined that a public employee's speech involved a matter of public concern, the court must then balance the employee's first amendment interest in expressing her views against the interest of the employer in "promoting

the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

Applying those principles to this case, counsel for Sheriff Leis makes a strong point that the complaint to the FBI here was an isolated one relating wholly to the personal concern of the plaintiff as a mother over the treatment given her son at the hands of another employee of the Sheriff's Department. No generalized policy or practice of constitutional violations is alleged to have been involved in the incident in question, nor did the plaintiff make or apparently desire to make any broader expression than the complaint to the FBI. Nonetheless, assuming but without expressly deciding that the speech was constitutionally protected, we are nonetheless of the opinion that in all events the balaneing test between the alleged exercise of protective speech, if such it was, and the interest of the Sheriff in the efficient performance by the employees of his department, decidedly favors the latter here. The intrusion upon the employee's right of expression was very slight, even viewed in the light most favorable to plaintiff. Sheriff's Rule 1.20 only required that she voice her concerns and her complaint about a fellow officer to the Sheriff whose ultimately responsibility it was to ensure the efficient and lawful operation of his staff. There is no showing that plaintiff here was forbidden from going to the FBI, but only that she was forbidden from communicating with the FBI without first having communicated the complaint to her immediate superior. Further, there was no allegation or showing that an observance of Sheriff's Rule 1.20 would have been futile had plaintiff sought relief through it on behalf of her son, nor is there any showing that the regulation itself was unreasonable or used as a means to cover up a general policy of illicit activity being carried on by the Sheriff's Department.

Finally, principles of efficient and honest law enforcement support the purposes of such a rule both in enabling the Sheriff to ferret out misconduct on the part of employees for whom he is responsible, and also as affording a means whereby disputes between officers in his department may be

promptly and effectively resolved with minimal damage to morale and to the good repute and standing in the community of the law enforcement agency itself.

Accordingly, the judgment of the district court is AFFIRMED.

Civil No. C-1-87-774

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JUDY HUBER,

Plaintiff,

vs.

SIMON LEIS,

Defendant.

ORDER
(Filed January 4, 1989)

This matter is before the Court upon plaintiff's complaint filed pursuant to 42 U.S.C. 1983 seeking redress for the deprivation of plaintiff's rights under the First Amendment to the United States Constitution by requesting declaratory and monetary damages (doc. no. 1). The parties have agreed to submit this matter to the Court for final disposition upon cross motions for summary judgment without oral hearing.

This action was originally filed on September 22, 1987 (doc. no. 1). On April 13, 1988, plaintiff filed a motion for partial summary judgment (doc. no. 5). Such motion was opposed by defendant (doc. no. 13) with accompanying affidavits (doc. nos. 8, 9, 10, 11, 12) and also supported by plaintiff (doc. no. 15). On June 29, 1988, this Court denied plaintiff's motion for summary judgment since a genuine issue of material fact existed (doc. no. 16). Subsequently the parties entered into stipulations of fact for cross motions for summary judgment (doc. no. 18) and also referred to facts stipulated in the Final Pretrial Order (doc. no. 17).

This Court has carefully examined the exhaustive memoranda and documents which the parties have filed on the merits of the claims (doc. nos. 1, 5, 8, 9, 10, 11, 12, 13,

15, 17, 18, 24, 25, 26). In accordance with Federal Rule of Civil Procedure 52, the Court does set forth its Findings of Fact, Opinion and Conclusions of Law.

I. FINDINGS OF FACT

1. Plaintiff Judy Huber has been employed by the Hamilton County Sheriff's Office, as a deputy sheriff assigned to the Corrections Division for the past five (5) years and is currently holding the position of Correction's Officer.

2. Plaintiff's typical duties include searching incoming female detainees, taking fingerprints, checking arrest records in computer files, and such other administrative tasks.

3. Plaintiff is not responsible for any policy-making roles in the Sheriff's Office, nor does she have any public contact role other than answering routine phone calls. She refers any callers asking policy related questions to the appropriate supervisor.

4. Plaintiff does not represent the Sheriff's Office or Hamilton County in its relations with the press. She does not have a close working relationship with defendant Simon Leis, nor does she have access to confidential information of the Sheriff's Office.

5. Defendant Simon Leis (Simon L. Leis, Jr.) is and has been the duly appointed, qualified and acting Sheriff of Hamilton County, Ohio, since June 1, 1987.[1]

6. On January 1, 1987, the Hamilton County Sheriff's Office adopted the Hamilton County Sheriff's Office Rules, Regulations and Disciplinary Process. Section 1.20 ("Sheriff's Rule 1.20") reads as follows:

> Any Sheriff's employee having a grievance involving another member that cannot be resolved amicably, shall first consult his immediate supervisor.

7. Plaintiff became aware of the above-quoted Sheriff's Rule 1.20 on January 1, 1987.

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[1] In November 1988 Mr. Leis was elected Sheriff of Hamilton County.

8. On August 6, 1987 at approximately 1:50 a.m., plaintiff's son, Charles Hans, was arrested by Patrol Officer Michael H. Fieler and Sergeant Dennis M. Lantry of the Hamilton County Sheriff's Office for criminal trespass and resisting arrest at the Colerain Township Elementary School.

9. In order to participate in the search and apprehension of three (3) other suspects, Patrol Officer Fieler handcuffed Hans to a chain link fence.

10. Shortly after the arrest of Hans, Patrol Officer Fieler notified plaintiff, who was on duty at the Justice Center, of her son's arrest.

11. Plaintiff did not complain about the manner of her son's arrest to Patrol Officer Fieler, Sergeant Lantry, her immediate supervisor nor to defendant before approaching the FBI.

12. On or about August 10, 1987, plaintiff complained to FBI agent David Lichtenfeld at the local Federal Bureau of Investigation (FBI) office alleging that her son's civil rights were violated by Patrol Officer Fieler when he handcuffed Hans to the fence.

13. Agent Lichtenfeld advised plaintiff that she should discuss the matter with defendant. He further advised plaintiff that if she was not satisfied with defendant's resolution of the incident she could return with Hans to the FBI office for further discussion.

14. On or about August 12, 1987 plaintiff approached the FBI office a second time and discussed the arrest incident of August 6, 1987 with FBI agent Edward Woods.

15. Agent Woods reviewed the complaint with the local supervisory FBI agent in charge of civil rights matters. Based upon this review, Agent Woods was instructed to close the FBI file on the incident.

16. Plaintiff and her son did not allege to either Agent Lichtenfeld or Agent Woods that defendant Leis had in any way violated, participated in, or condoned the arresting officer's alleged violation of Hans civil rights, or that the arresting officer's alleged violation of Hans' civil rights was part of a pattern, custom, policy or practice of Hamilton County,

the Hamilton County Sheriff's Office, the Sheriff, or the employees of the Hamilton County Sheriff's Office.

17. Defendant Leis was personally unaware and unfamiliar with the apprehension and arrest of plaintiff's son on August 6, 1987, until after plaintiff registered a complaint to the FBI. Plaintiff has never discussed her son's arrest with defendant.

18. On or about September 1, 1987, defendant approved and issued a written reprimand to plaintiff after ascertaining that plaintiff had violated Sheriff's Rule 1.20.

II. OPINION

The issue before this Court involves an inquiry into the plaintiff's First Amendment Rights. It involves a two step process in which the District Court must first determine whether the plaintiff's speech addresses a matter of public concern. If the Court finds in the affirmative, it must then balance the public employee's rights of free speech in commenting upon matters of public concern against the interest of the state, as an employer, in promoting an orderly and efficient administration of public services performed through its employees. *Connick*, 461 U.S. at 142; *Pickering*, 391 U.S. at 568.

The initial inquiry is whether plaintiff's speech can be characterized as constituting speech on a matter of public concern. The "expressly guaranteed freedoms" of the First Amendment share a common care purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575 (1980). It is well settled that a state cannot condition public employment on any basis that infringes upon the employee's constitutionally protected interest of freedom of expression. *Connick* v. *Myers*, 461 U.S. 137, 142 (1983); *Branti* v. *Finkel*, 445 U.S. 507, 515-516 (1980); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Speech which is considered that of "public concern" is cer-

tainly afforded these constitutional guarantees. However, speech of public employees which may be characterized as *not* of "public concern" involves speech which deals with individual personnel disputes and grievances and other information which would be of no relevance to the public's evaluation of the performance of governmental agencies. *McKinley* v. *City of Eloy*, 705 F.2d 1110 (9th Cir. 1983). Thus, when employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intensive oversight by the judiciary in the name of the First Amendment. *Connick*, 461 U.S. at 146; *Garvie* v. *Jackson*, 845 F.2d 647, 650 (6th Cir. 1988); *McMurphy* v. *City of Flushing*, 802 F.2d 191, 196-197 (6th Cir. 1986). It should be forwarned that absent the most unusual circumstances, when a public employee speaks upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Connick*, 461 U.S. at 147. On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government is certainly meritorious of the highest degree of the First Amendment protection. *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1946).

The Supreme Court prescribed a balancing method in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), for determining when a public employee's speech addresses a matter of public concern. The trial court must make this determination as a matter of law on the basis of "the content, forum, and context of a given statement, as revealed by the whole record. *Connick* v. *Myers*, 461 U.S. at 147-188; *McMurphy* v. *City of Flushing*, 802 F.2d at 197.

Pickering made clear that educators should be able to speak out freely on educational questions of public concern. In that case, the Court held that a teacher could not be dismissed in retaliation for a letter publicly criticizing the School Board's

allocation of school funds and its methods of informing, or not informing, voting taxpayers of the reasons why additional tax revenues were being sought for the school system. The Court's professed goal was a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. In reaching its conclusion, the Court considered two factors; (1) Pickering's criticism was in no way directed toward anyone with whom he personally worked on a daily basis, and (2) that the subject on which Pickering commented, the school system's need for additional funds, was a question determined by popular vote and obviously a matter of public concern and interest. *Id.* at 569-70, 571.

By contrast, *Connick* v. *Myers*, 461 U.S. 138, (1983), presented a case in which an employee's criticism of her superior threatened to undermine authority and morale in a government workplace. Myers, an Assistant District Attorney, was dismissed based on her refusal to accept a transfer and also on her insubordination by circulating an office questionnaire regarding various matters, including office morale and pressure to work in political campaigns. Although the Court found that Myers' question regarding pressure to work in political campaigns touched on a matter of public concern, the Court balanced Myers' interest against the state's interest. It concluded that "The limited First Amendment interest involved here does not require that [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154.

The three most recent instructive cases on this issue in the United States Court of Appeals for the Sixth Circuit are *Mahronic* v. *Walker*, 800 F.2d 613 (6th Cir. 1986); *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986); and *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988).

Mahronic involved a situation where an employee of the Barren River Regional Mental Health-Mental Retardation

Board ("Board") aided in an investigation of Medicaid fraud occurring at the Board. Retaliatory conduct ensued by the Board's Executive Director and Mahronic was forced to resign. He filed a civil rights action under 42 U.S.C. § 1983 which ended in a settlement agreement. Mahronic then pursued alternative employment but encountered enormous defficulty, apparently from bad recommendations of his former employer. He subsequently filed a second action alleging that those recommendations were violations of both the settlement agreement and his First Amendment rights.

The United States Court of Appeals for the Sixth Circuit ultimately found that Mahronic's speech involving corruption in government to the Kentucky Attorney General was a matter of public concern and therefore protected by the First Amendment against any negative actions by his former employer.

The second of these cases is *McMurphy* v. *City of Flushing*, 802 F.2d 191 (6th Cir. 1986) which involved among other matters, statements made by a police officer to a Police Chief and Police Lieutenant and then further made to persons outside the police establishment. The Sixth Circuit determined that in this instance these remarks to and about the Police Chief and Lieutenant were insubordinate and served no public purpose. Most of the officer's accusations, threats and abusive conduct toward his superiors were simply made in spite which the Court derived from the obvious overtones of personal frustration.

The final case addressing this issue is *Garvie* v. *Jackson*, 845 F.2d 647 (6th Cir. 1988). The plaintiff, Peter Garvie, Head of the University of Tennessee's Department of Speech, presented several concerns to the Provost regarding certain actions by the Dean of the Department. Although this case turned on the doctrine of qualified immunity, the United States Court of Appeals for the Sixth Circuit found that a department head's criticism of his superior's actions regarding the allocation of funds within a department, review of faculty grievances, and departmental votes on faculty nonretention were not matters of public concern. The record showed that

Garvie's criticisms more closely resembled an employee's complaints regarding his superior's actions.

In light of *Pickering* and its progeny, this Court finds that the public employee speech in the present case is substantially involved in matters of public concern "and is therefore entitled to the highest level of protection." Plaintiff's speech was motivated by her belief that her son's constitutional rights were violated by Deputy Fieler on August 6. Clearly it is a matter of public concern to the citizens of Hamilton County that the Sheriff's Deputies are conducting themselves lawfully in the performance of their duties. An exhaustive review of the record does not reveal that plaintiff's inquiry to the FBI represents threats, abusive conduct, spite or any other personal frustration toward her colleagues or superiors. This Court also notes as the Supreme Court did in *Pickering* that plaintiff's complaint was not directed at anyone she would be working with on a day to day basis.

Once speech is determined to be a matter of public concern, the Court must further balance the individuals First Amendment interest against the interest of the employer in conducting an orderly and efficient office maintaining authority and also close working relationships.

This Court has carefully considered the Sheriff's reasons and objectives in enacting Rule 1.20 which are the maintenance of strict discipline, high morale, first-rate job competence, and a unified effort at public service among all Sheriff's Office employees, thereby earning, projecting and maintaining a well-deserved positive public image of the Sheriff's Office and employees. It should be observed in passing that Rule 1.20 does not bar any expression by anyone, it only requires a consultation with a supervisor as an initial step to resolve internal conflicts.

Furthermore, as the Supreme Court emphasized in *Connick*, the matter of closeness of working relationships is a critical factor in the Court's determination. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. We do not see the necessity for an

employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationship is manifest before taking action. 461 U.S. at 151-52.

In this light this Court finds that the limited First Amendment interest involved here does not require that the defendant tolerate action which he reasonably believed would disrupt the office, undermine his authority and possibly destroy close working relationships. Plaintiff's actions already have and further enhance the potential for undermining the authority of the Sheriff. Finally, this Court notes that the action of the Sheriff was limited to a written reprimand and did not rise to any drastic level such as discharge from employment.

III. CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1343 and the First Amendment to the Constitution of the United States.

2. A public employee's speech is constitutionally protected when it is characterized as speech on a matter of public concern. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Connick* v. *Myers*, 461 U.S. 138 (1983).

3. Speech is considered relating to a matter of public concern when it is directed toward any matter of political, social or other concern to the community. *Connick*, *supra*. Such a determination is made as a matter of law on the basis of the content, forum and context of a given statement as revealed by the whole record. *Connick*, *supra*.

4. Plaintiff Judy Huber's speech touched upon a matter of public concern as to the manner in which Sheriff's Deputies lawfully conduct themselves in performing an arrest.

5. If speech touches upon a matter of public concern, the Court must then balance the individual's First Amendment right against the employer's interest in maintaining an orderly, efficient and unified performance of public duties. *Connick*, *supra*.

6. In the instant situation, the interest of plaintiff Huber in asserting her public concerns does not outweigh the enactment and implementation of Sheriff's Rule 1.20 to avoid disruption of the office, undermine the Sheriff's authority, or destroy close working relationships.

In accordance with the foregoing and for the reasons contained herein, plaintiff Judy Huber's motion for summary judgment as to all claims in the complaint is hereby DENIED and defendant Simon Leis's motion for summary judgment as to all claims in the complaint is GRANTED.

It is so ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court